

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98561; File No. SR-Phlx-2023-44)

September 27, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Pricing Schedule at Options 7, Section 4 Regarding Marketing Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 13, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposal to amend its Pricing Schedule at Options 7, Section 4.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange’s Pricing Schedule at Options 7, Section 4 to specify the application of its marketing fees. Today, the Exchange delineates pricing for multiply-listed options in Options 7, Section 4, including marketing fees (“Marketing Fees”). The Marketing Fees for multiply-listed options are assessed on Lead Market Makers,³ Market Makers,⁴ and Directed Market Makers⁵ for trades resulting from either Directed or non-Directed Customer Orders⁶ that are delivered electronically and executed on the Exchange, with certain specified exceptions, including the exclusion of transactions in broad-based index options symbols listed in Options 7, Section 5.A.

The Exchange now proposes to amend the rule to specify that no Marketing Fees will be assessed on transactions in options symbols subject to Options 7, Section 5 pricing⁷ to make

³ The term "Lead Market Maker" applies to transactions for the account of a Lead Market Maker (as defined in Options 2, Section 12(a)). A Lead Market Maker is an Exchange member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a). An options Lead Market Maker includes a Remote Lead Market Maker which is defined as an options Lead Market Maker in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Options 2, Section 11.

⁴ The term "Market Maker" is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as Floor Market Makers.

⁵ The term "Directed Market Maker" means a Market Maker that receives a Directed Order in accordance with Options 2, Section 10.

⁶ The term "Directed Order" means any order to buy or sell which has been directed to a particular Lead Market Maker, RSQT, or SQT by an Order Flow Provider, as defined in Options 2, Section 10. To qualify as a Directed Order, an order must be delivered to the Exchange via the System.

⁷ Options 7, Section 5 sets forth pricing for index and singly listed options (includes options overlying FX Options, equities, ETFs, ETNs, and indexes not listed on another exchange).

clear that the exclusion also applies to all singly listed options subject to pricing in Options 7, Section 5.C and Options 7, Section 5.D (in addition to broad-based index options symbols in Options 7, Section 5.A, as currently specified). The Exchange notes that this is not a change to current practice; rather, the proposed changes are intended to memorialize how the Exchange currently assesses Marketing Fees. Today, the Exchange already indicates in the header of Options 7, Section 4 that the pricing set forth in Section 4 (including Marketing Fees) applies only to multiply listed options excluding SPY and the broad-based index options in Options 7, Section 5.A. Section 4 specifically excludes the broad-based index options in Options 7, Section 5.A because some of the symbols (like NDX) are multiply listed. Furthermore, Options 7, Section 5 specifically indicates that the pricing set forth in this Section 5 applies to index options and singly listed options. By implication, options that are singly listed on Phlx, and that are subject to Options 7, Section 5.C and Section 5.D pricing are excluded from Options 7, Section 4 pricing like the Marketing Fees. However, the Exchange believes that further clarity will be helpful by explicitly stating this exclusion in the Marketing Fees portion of Section 4 to avoid potential confusion by market participants and investors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4) and (5).

The Exchange believes that the proposed changes in Options 7, Section 4 to specify that no Marketing Fees will be assessed on transactions in options symbols subject to Options 7, Section 5 pricing are reasonable because the changes will make clear that the exclusion also applies to all singly listed options subject to pricing in Options 7, Section 5.C and Options 7, Section 5.D (in addition to broad-based index options symbols in Options 7, Section 5.A, as currently specified). As discussed above, the proposed changes will not amend current practice; rather, the proposed changes are intended to memorialize how the Exchange currently assesses Marketing Fees. While the Exchange already indicates which sections of its Pricing Schedule apply to which options in the manner discussed above, the Exchange believes that further clarity will be helpful by explicitly stating in the Marketing Fees pricing program itself that all symbols subject to Options 7, Section 5 pricing will be excluded from the Marketing Fees in order to avoid potential confusion by market participants and investors. The Exchange also believes that it is reasonable to exclude singly listed options in Options 7, Section 5 from the Marketing Fees because the purpose of this program is to generate more Customer order flow to the Exchange. Because singly listed options are exclusively listed products on Phlx, the Exchange does not believe that applying Marketing Fees is necessary for these products.

Lastly, the Exchange believes that its proposal to memorialize that all options symbols subject to Options 7, Section 5 pricing are excluded from the Marketing Fees program set forth in Options 7, Section 4 is equitable and not unfairly discriminatory because the program will uniformly exclude all market participant orders in these symbols. As noted above, the Exchange's proposal does not alter its existing Marketing Fees program, but instead memorializes current practice.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that its proposal would impose an undue burden on intra-market competition. The proposed changes will memorialize current practice that no Marketing Fees will be assessed on transactions in options symbols subject to Options 7, Section 5 pricing, which will continue to apply uniformly to all market participant orders in such symbols.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁰

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2023-44 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-Phlx-2023-44. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2023-44 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Sherry R. Haywood,
Assistant Secretary.

¹¹ 17 CFR 200.30-3(a)(12).